

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESALE PRICE  
LITIGATION

THIS DOCUMENT RELATES TO ALL  
CLASS ACTIONS

MDL No. 1456

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

**PLAINTIFFS' [CORRECTED] MEMORANDUM IN SUPPORT OF  
MOTION TO COMPEL COMPLIANCE WITH CMO NO. 7 AGAINST DEFENDANTS  
ABBOTT, DEY, SHERING-PLOUGH AND WARRICK**

On August 15, 2003 the Court issued CMO No. 7 that provided in part as follows:

II. Allowed Discovery Pending Decision on Motions to Dismiss

1. Plaintiffs shall conduct discovery on claims set forth *against a defendant named in the MCC that was not dismissed as to both Class 1 and Class 2 claims*. The specific drugs subject to discovery are those identified in the defendant-specific allegations of the MCC if the MCC identified a specific plaintiff who purchased the drug. There shall be no discovery on multi-source drugs.

3. *All non-dismissed defendants are directed to supplement their document productions* under the order of this Court dated October 28, 2002 (relating to production of documents produced to governmental bodies concerning AWP matters) by producing all documents produced by a non-dismissed defendant in response to recent subpoenas issued by the House Energy and Commerce Committee, or any other governmental body, by making such documents available to counsel for the plaintiffs for inspection and photocopying within 30 days. (Emphasis added.)

Defendants Abbott, Dey, Schering-Plough and Warrick received a letter from the U.S. House Committee on Energy and Commerce on June 26, 2003 requesting the production of documents relating to AWP issues. See News Release from the Committee on Energy and Commerce attached hereto as Exhibit A.

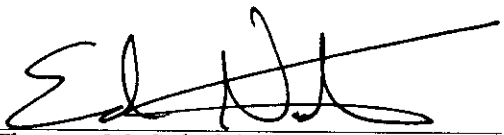
These Defendants were not dismissed from Class 2 of the Master Consolidated Class Action Complaint (the "MCC"). See *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 263 F. Supp. 172, 195 (D. Mass. 2003).

These Defendants have not complied with CMO No. 7 that requires production to Plaintiffs of documents produced to the House Energy and Commerce Committee by non-dismissed Defendants. Instead each of these Defendants has taken the position that as manufacturers of multi-source drugs they were dismissed from the MCC. See correspondence from Defendants attached hereto as Exhibit B. Plaintiffs believe that Section II, ¶3 of CMO 7 applies to Defendants not "dismissed as to both Class 1 and Class 2 claims." None of these Defendants were dismissed from both Classes of the MCC, hence ¶ 3 of CMO No. 7 applies despite the fact that elsewhere, discovery on multi-source drugs is not permitted by CMO No. 7.

Plaintiffs hereby request that the Court enter an Order requiring each of Defendants Abbott, Dey, Schering-Plough and Warrick comply with CMO No. 7 and supplement their production to Plaintiffs accordingly. Plaintiffs have filed herewith a Proposed Order for the Court's consideration.

Respectfully Submitted,

DATED: September 17, 2003

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**CERTIFICATE OF SERVICE**

I hereby certify that I, Edward Notargiacomo, an attorney, caused true and correct copies of the foregoing Plaintiffs' Memorandum in Support of Motion To Compel Compliance With CMO No. 7 Against Defendants Abbott, Dey, Shering-Plough and Warrick to be served on all counsel of record electronically, pursuant to Section D of Case Management Order No. 2., this 17<sup>th</sup> day of September, 2003.

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